In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-329

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts, et al.,

Appellants,

vs.

WILLIAM BAIRD, et al.,

Appellees.

AND

No. 78-330

JANE HUNERWADEL,

Appellant,

vs.

WILLIAM BAIRD, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION AND BRIEF, AMICI CURIAE OF AMERICANS UNITED FOR LIFE, INC. AND EUGENE F. DIAMOND, M.D. IN SUPPORT OF APPELLANTS FRANCIS X. BELLOTTI AND JANE HUNERWADEL

VICTOR G. ROSENBLUM
DENNIS J. HORAN
JOHN D. GORBY
THOMAS J. MARZEN
PATRICK A. TRUEMAN
230 North Michigan Ave., Suite 515
Chicago, Illinois 60601
312 263-5386
Attorneys for AMERICANS UNITED FOR LIFE, INC. and EUGENE F. DIAMOND, M.D.

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

TABLE OF CITATIONS

Cases

Statutes

Articles and Books

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-329

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts, et al.,

Appellants,

vs.

WILLIAM BAIRD, et al.,

Appellees.

AND

No. 78-330

JANE HUNERWADEL,

Appellant,

vs.

WILLIAM BAIRD, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

PURPOSE OF THIS MOTION

Garrick F. Cole, Assistant Attorney General of Massachusetts representing appellants Bellotti et al., Brian A. Riley representing appellant Hunerwadel, and John Henn representing appellee Planned Parenthood League of Massachusetts have given consent for the filing of this Amici Curiae brief. Joseph J. Balliro representing appellee William Baird did not respond to a letter from Amici requesting consent. Letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICI

Americans United For Life (AUL) is a national educational foundation organized to educate and promote better understanding of the humanity of the unborn and the value of human life, and to assure equal protection under law for all members of the human family regardless of age, health, or condition of dependency. The national office of Americans United For Life is located in Chicago, Illinois, and its membership includes approximately 20,000 persons located in every state of the union.

The Board of Directors and Officers of Americans United for Life include the following:

Eugene F. Diamond, M.D. is the Intervening Defendant-Appellant in *Wynn* v. *Carey and Diamond*, No. 78-2248 *appeal docketed* (7 Cir., Sept. 29, 1978) in which the Illinois Abortion Parental Consent Act of 1977, Public Act 80-1139, Ill. Rev. Stat. ch 38, §81-51 et seq. (1977) is challenged. (See relevant portions in Appendix B) Dr. Diamond intervened as a parent of a minor daughter of childbearing age to protect his fundamental common law and constitutional rights as a parent.

In at least two respects the Illinois Act is similar to the Massachusetts Act before this Court: 1) notice to the parents of a minor daughter seeking an abortion is required in all instances; 2) a legislative standard is established for balancing on a case by case basis the fundamental rights of the parents with the fundamental rights of the minor seeking an abortion in the event of a conflict concerning the making and effectuation of the decision. The Illinois standard is somewhat different than the Massachusetts standard because it is based on the competence of the minor, allowing a minor to obtain consent by order of a judge after a finding that the pregnant minor "fully understands the consequences of an abortion to her and to her unborn child." The Massachusetts Standard is based on "best interest" of the minor thereby allowing a court order "for good cause shown." Many of the issues raised in the Illinois Act are thus before this Court in this case challenging the Massachusetts Act.

Dr. Diamond seeks resolution of this case in a way that will not adversely affect his fundamental parental rights which are protected in the challenge to the Illinois Abortion Parental Consent Act of 1977.

This brief Amici Curiae is filed in support of Appellants Bellotti et al., and Appellant Hunerwadel, and also to present arguments to this Court that the Massachusetts Act challenged herein is constitutional.

These Amici respectfully request this Court to grant this Motion and allow the filing of this Brief served herewith.

Respectfully submitted,

VICTOR G. ROSENBLUM
DENNIS J. HORAN
JOHN D. GORBY
THOMAS J. MARZEN
PATRICK A. TRUEMAN
Attorneys for AMERICANS UNITED FOR LIFE, INC. and
EUGENE F. DIAMOND, M.D.
230 North Michigan Ave.
Suite 515
Chicago, Illinois 60601
312/263-5386

December 14, 1978

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-329

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts, et al.,

Appellants,

VS.

WILLIAM BAIRD, et al.,

Appellees.

AND

No. 78-330

JANE HUNERWADEL,

Appellant,

VS.

WILLIAM BAIRD, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF AMICI CURIAE

Introduction

Parents have fundamental common law and constitutional rights to educate and provide moral and other guidance to their minor children. Under certain circumstances

these rights may conflict with the fundamental abortional rights of a minor, particularly when the minor seeks an abortion against the wishes of her parents. The Massachusetts Act (See Appendix A) provides a workable and reasonable legislative standard whereby courts may resolve the conflict between parents and their minor children on a case by case basis by balancing the fundamental rights involved without permitting one right to totally subsume the other.

I. Parents Have Fundamental Rights to Educate and to Provide Moral and Other Guidance to Their Minor Children.

A) Common Law Rights of Parents

The common law rights of parents with regard to their minor children were extensive. 1 Blackstone, Commentaries on the Law of England, 446 *et seq.* (23rd ed., ed. J.J. Wendell, 1854, Harper & Bros., N.Y.); 2 Kent, Commentaries on American Law, 203 *et seq.* (12th ed., ed. O.W. Holmes, 1873, Little Brown & Co., Boston). Indeed, to specify the extent of parental prerogatories in American common law, Kent cites and explains the following case:

> In the case of Commonwealth v. Armstrong, in the session of the peace of Lycoming County, Pennsylvania, in 1842, Mr. Justice Lewis, the presiding judge, decided, after a learned examination of the subject that a minister of the gospel had no right, contrary to the express commands of the father, to receive an infant daughter, under the immediate guardianship of the father, from the church to which the father belonged, and in which the child was baptized and instructed and initiate it, by baptism, into another church of a different denomination. It was held to be the right and the duty of the father, not only to maintain his infant children, but to instruct their minds in moral and religious principles, and to regulate their consciences by a course of education and discipline. All interference with the parental power and duty, except by the courts of justice, when that power is abused, is injurious to domestic subordination, and to the public peace, morals and security. Parents, says a distinguished jurist on natural law, have the right by the law of nature to direct the actions of their children, as being a power necessary to their proper education. It is the will of God, therefore, that parents should have and exercise that power. Nay, he observes, parents have the right to direct their children to embrace the religion which they themselves approve. (Heineccius's Elem. Jur. Nat. et. Gentium, b. 2, c. 3, secs. 52, 55.)

2 Kent at 203 n. c.

Similarly, the marriage of a minor without parental consent was void at common law. 1 Blackstone, at 451.

Under the common law parents in most instances have the right not only to influence and persuade their children but also to guide and make actual decisions for their children.[1]

---

[1] Several states have statutes which permit physicians to treat minors who have venereal disease or minors who are pregnant. These statutes have little, if any, bearing on the immediate issues before this Court for several reasons. They were enacted primarily to protect the physician against tort actions by parents or children for failure to obtain a valid consent for treatment. There does not appear to be any indication that these statutes were enacted to alter the legal relationship between parent and child as opposed to the legal relationship between child and physician or parent and physician. If the legislative intent had been to alter the parent-child relationship, serious constitutional questions would be raised. The compatibility of these statutes with the constitutional rights of parents has never been determined. Indeed, in a closely related case, *Doe* v. *Irwin*, 428 F. Supp. 1198 (1977), a federal district court held that the distribution by a state supported agency of contraceptives to minors without parental notice interferes with fundamental parental rights.

Thus the common law does not warrant the conclusion that the minor enjoys a right against the parent to procure a "secret abortion" or that the physician might proceed upon that basis.[2]

The Massachusetts Act, approached from the perspective of the parents' fundamental common law rights, limits the parents' common law right to actually make the abortion decision for the child since it permits the court to override the parents' decision for "good cause shown." This statute is analogous to the typical marriage statutes such as that in Illinois, Ill. Rev. Stat. ch. 40, §208 (1977), whereby the Court is empowered to provide consent for a minor to marry, thereby overriding the parents' refusal to consent to the marriage. To be emphasized is that, though these statutes limit the decision-making power of the parents, they do not limit the right of the parties to be notified of the child's intentions and desires and the corresponding right to attempt to influence and persuade their child according to their family moral and theological principles or according to the parents' notions of what serves the best interests of the child.

B) Fundamental Constitutional Rights of Parents

The common law right of parents to nurture and guide their children is protected from state action by the Federal

---

[2] Concerning medical treatment generally.

> "[i]n the absence of an emergency, an operation performed on a child without the consent of the parents or person standing in loco parentis is a legal wrong." 70 C.J.S. *Physicians and Surgeons* §48 (1951).

See also 61 Am. Jur. 2d *Physicians, Surgeons* 161 (1972); Restatement 2nd of Torts 59, Comment a, Illustration I (1965); 59 Am. Jur. 2d *Parent and Child* §15 (1972).

Constitution. The legislative history of the 14th Amendment to the United States Constitution reflects the concern of the drafters of the Amendment for the maintenance of the family structure for all members of the human family, including ex-slaves. In fact, whatever the origin of the minor's right to abortion, recognition of the parents' right to custody and guidance of their minor children is explicitly grounded in the intent of the Framers of the post-Civil War Amendments. The abolishionists saw one of the most repulsive features of the institution of slavery in the power of private parties to cause the slave's "authority and responsibility to rear his children [to be] obliterated. The members of his family might be torn from him and scattered." J. tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (1951).

The Framers of the post-Civil War Amendments would have regarded any suggestion that pregnant minor children have a constitutional right under the Fourteenth Amendment to conceal abortion from the parents as not only without foundation in law, but actively hostile to the spirit of the Amendments. When Senator Harlan of Iowa elaborated on the evils of slavery which the 13th Amendment[3] was intended to abolish, he noted that under slavery,

> [t]he conjugal relationship is abrogated. . . . Another incident is the abolition practically of parental relation, robbing the offspring of the care and attention

---

[3] The intents of the Framers of the Thirteenth Amendment has a common origin with the Fourteenth. *See* Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 Mich. L. Rev. 1049 (1956); Graham, *The Early Antislavery Origins of the Fourteenth Amendment*, 1950 Wis. L. Rev. 479; Graham, *The Early Antislavery Background of the Fourteenth Amendment*, 1950 Wis. L. Rev. 610.

> of his parents, severing a relation which is universally cited as the emblem of the relation sustained by the Creator to the human family. And yet . . . this guardianship of the parent . . . must be abrogated to secure the perpetuity of slavery.

Congressional Globe, 38th Cong., 1st Session 1439 (1864).

Likewise, Senator Wilson of Massachusetts said that if the Amendment were adopted, "[t]hen the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law. . . ." *Id.* at 1324.

The Fourteenth Amendment thus was most clearly adopted to provide former slaves access to the judicial process[4] to vindicate commonly acknowledged rights. Among those rights were freedom from invasion of family privacy and the relational interests of parent to child. *See* Green, *Relational Interests,* 29 Ill. L. Rev. 460 (1934); Foster, *Relational Interests in the Family,* 1962 U. Ill. L. Forum 493; Pound, *Individual Interests in the Domestic Relations,* 14 Mich. L. Rev. 177 (1916).

This Honorable Court, in a series of cases dating to 1923, has recognized as fundamental these rights of parents under the 14th Amendment. In *Meyer* v. *Nebraska,* 262 U.S. 390 (1923) the Court held a Nebraska law making it a criminal offense to teach a foreign language to children before the ninth grade unconstitutional as a violation of the fundamental and "essential" rights of parents to control the education and upbringing of their children.

Similarly, *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), held the same parental rights precluded the State

[4] *See* Berger, Government by Judiciary, 169 et seq. (1977).

from forbidding parents to send their children to sectarian rather than public schools:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; *those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.*

Pierce v. *Society of Sisters,* 268 U.S. at 534-535. (Emphasis added.)

In *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944) this Court said, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." More recently, relying upon *Meyer* and *Pierce,* this Court upheld the rights of Amish parents to disregard certain mandatory school attendance statutes:

> [T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the *nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate* as an enduring American tradition.

Wisconsin v. *Yoder,* 406 U.S. 205, 235 (1972). (Emphasis added.)

Indeed, this Court has held that, under the 14th Amendment, even the putative father is entitled to a hearing before parental prerogatives are terminated, stating:

> The private interest here . . . undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* v. *Cooper*, 336 U.S. 77, 95 (1949).

Stanley v. *Illinois*, 405 U.S. 645, 651 (1972). *Cf. Rothstein* v. *Lutheran Social Services*, 405 U.S. 1051 (1972); *Vanderlaan* v. *Vanderlaan*, 405 U.S. 1051 (1972); *Armstrong* v. *Manzo*, 380 U.S. 545 (1965).

Clearly, as Mr. Justice Stewart, concurring in *Ginsburg* v. *New York*, 390 U.S. 629 (1968), has stated, ". . . the legislature could properly conclude that parents . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility," *id.* at 639, and thereby affirm the "right of parents to deal with the morals of their children as they see fit." *Id.* As a recent decision requiring notice to parents before disbursements of contraceptives to minors by a state supported agency has held, the parental rights at stake

> . . . are protected under the First, Fifth, Ninth, and Fourteenth Amendments to the Constitution from the officious intermeddling of (even) well-intentioned public officials. . . . Therefore, absent a showing of compelling state interest, or a showing of superior rights in the minor child, the State may not totally exclude parents from the decision of their minor, unemancipated children as to whether *or not* to initiate sexual activity and consent to the risks of contraceptive devices and medications. A refusal to recognize the rights and the responsibilities of parents in such fundamental decisions of their children would present a frightening alternative.

> Nor do I read the recent decisions of the Supreme Court and other federal courts with regard to parental consent in the decisions of their children to have an abortion as allowing the State to totally exclude the parents of the child from such an important matter. (Emphasis Original).

Doe v. *Irwin*, 428 F.Supp. 1189, 1206-07 (1977).

The scope of the parents' fundamental constitutional rights is similar to their common law rights. Parents have the constitutional right not only to influence and persuade their children (a right which can be exercised in the abortional context only after notice of this child's pregnancy has been received) but also to guide and to make actual decisions for their children. This constitutional right is subject to limitation only on a case by case basis when it conflicts with other fundamental constitutional rights or to limitation by statute narrowly drawn to protect a compelling state interest.

Approached from the perspective of the parents' constitutional rights, the Massachusetts' statute limits the parents rights to decide for the child by empowering the court to override parental decisions on a case by case basis for "good cause shown."

The longstanding and fundamental privacy rights of the parents of minors—rights from which abortional privacy is itself derivative (see Section I, C below)—are at stake in this adjudication of the Massachusetts Act. Irreparable harm to these parental rights and interests, which the Massachusetts Act, on its face is designed to protect, would result if this Court upholds the lower court decision. Indeed, the judiciary is just as capable of vitiating constitutional rights as the legislature or executive. (See further discussion of this in Section II, *infra*.)

C) The Fundamental Common Law and Constitutional Rights of Parents Have Not Been Overruled, Modified, or Altered by Roe v. Wade

These fundamenal rights of parents were neither overruled, modified, changed nor altered by *Roe* v. *Wade*, 410 U.S. 113 (1973). Indeed, this Court in *Roe* found support for its conclusion that "the right of privacy includes the abortion decision" in the very parental rights cases discussed above. See *Roe* v. *Wade*, 410 U.S. at 152-53. See also Mr. Justice Stewart's concurring opinion in *Roe*, where (at 168 and 169) he supports his conclusion that a right to an abortion "is embraced within the personal liberty protected by the due process clause of the 14th Amendment" (at 170) with *Pierce* v. *Society of Sisters*, *Meyer* v. *Nebraska*, and *Prince* v. *Massachusetts*. Mr. Justice Douglas also supported his conclusion that there is a constitutionally protected right to an abortion with *Pierce* v. *Society of Sisters* and *Meyer* v. *Nebraska* (at 212 and 214).

The validity of *Pierce* and *Meyer* was reaffirmed in *Maher* v. *Roe*, 432 U.S. 464 (1977), which upheld a Connecticut restriction of state funds for abortions against a constitutional challenge, since this Court employed examples from *Meyer* and *Pierce* to reach its decision. And, furthermore the *Maher* Court stated that the rights recognized in *Meyer* and *Pierce* were "closely analogous" to that of *Roe*. *Maher* v. *Roe*, 432 U.S. at 476. The only conclusion, regarding parental rights to influence and guide their minor children, that may be gleaned from *Roe* v. *Wade* is that these parental rights are completely compatible with privacy rights.

D) Planned Parenthood v. Danforth Did Not Subordinate the Fundamental Common Law and Constitutional Rights of Parents to Any Abortional Rights of Pregnant Minor Children

As shown above, parental rights involve, at a bare minimum, the right to be informed of a minor child's pregnancy so that parents may attempt to influence and persuade the child according to the values and morals of the family and involve, at a maximum, the power to make the ultimate abortion decision in all instances. The parental consent provision in the Missouri statute ruled unconstitutional in *Danforth* provides parents with an absolute power to veto the abortion decision of the pregnant minor in all instances. From the perspective of the parents' common law and constitutional rights, the Missouri statute was completely constitutional. However, this Court held the statute violative of the pregnant minor's abortional freedom (the scope of which is discussed below in Section II) since the state of Missouri does not have the power to "impose a blanket provision" and could not give to a third party, *i.e.*, the parents, a power the State did not have. *Danforth* thus dealt only with the question of the parents power to make the abortion decision for their minor child in all instances. It did not deal with the question of the right of the parents to be notified of their daughter's pregnancy or of her intention to seek and have an abortion or of their right to attempt to influence and persuade their minor child, assuming *arguendo* she has the right of ultimate decision in a given case. Thus, the "notice and right to influence" aspect of parents' rights remain unaffected by *Danforth*.

Though *Danforth* dealt with the question of who has the authority to make the ultimate abortion decisions, the parents or the child, this Court did not resolve

the question in the favor of the parents or the minor child. Rather the Court said that "any independent interest the parent may have in the termination of the minor daughter's pregnancy is *no more weighty* than the right of privacy of the competent minor. . . ." *Planned Parenthood* v. *Danforth,* 428 U.S. at 75 (Emphasis added.) The Court emphasized that its holding did not suggest that "*every minor,* regardless of age or maturity, may give effective consent for termination of her pregnancy" *Id.* at 75. (Emphasis added.) The Court's language leads to the inescapable conclusion that the ultimate *decision* of whether a minor child may abort is not for the parents to make in all cases, but must be resolved on a case by case basis.

Only by requiring that a conflict between parents and child concerning the abortion decision be resolved on a case by case basis does this Court avoid permitting one fundamental right from subsuming the other. The right of privacy cannot be thought to be the "preferred right" or "pivotal right" under the constitutional scheme. Rather it is one of several fundamental rights which, when in conflict, with another fundamental right, must be balanced to prevent one right from destroying the other. The Massachusetts Act simply provides a legislative standard, *i.e.*, "for good cause shown," for resolving the conflict between the parents and the child in the individual case thus permitting both rights continued existence.[5]

In summary, the parents' rights to be notified of their minor daughter's pregnancy and intended abortion and their right to attempt to influence and persuade her remains totally unaffected by *Danforth.* Although *Danforth* does suggest limitations to the parents' decision-making powers in the abortional context, *Danforth* does not completely subordinate the parents' rights to decide to that of the child's. Rather, it suggests that both rights are equally fundamental, equally weighty. Thus, any conflict must be resolved by a rational standard. The Massachusetts Act provides such a standard.

[5] The Illinois Abortional Parental Consent Act provides a different type of standard for the resolution of a dispute on a case by case basis. The Illinois standard is "competence" of the minor to understand the nature of her decision to herself and her unborn child. *See* Appendix B.

II. Fundamental Abortional Rights Are Not Violated by the Massachusetts Act Which seeks to Balance Competing Fundamental Rights on a Case by Case Basis.

Although the exact scope of the fundamental right of privacy in the abortional context has not been clearly defined by this Court, there appears to be several possible constructions. The first and narrowest construction, is that abortional freedom is limited to the right to decide to have an abortion and to effectuate, without state interference, that decision. A second and somewhat broader construction is that the abortional right includes the right to decide and effectuate as well as the right to a secret abortion. Each construction and its effect on the right of parental notice and parental involvement in the decision will be discussed individually.

A. Narrow Construction of the Abortional Right.

1. Notice to the Parents.

Roe and its progeny demonstrate that the fundamental right to privacy includes the right to decide whether or not to abort and to effectuate that decision. *Roe* v. *Wade,* 410 U.S. at 153; *Planned Parenthood* v. *Danforth,* 428 U.S. at 60. It appears from these cases that the major reason for the abortion right is to be to free the woman of the burdens of an unwanted child and the right does not ap-

pear to extend further to the right to have a secret abortion. Thus the abortional right is a very limited one and if a minor may effectuate her decision her right is not limited by a requirement of notice to parents. In short, under this narrow construction notice provides no burden on abortional rights. Your amici urge this Court to accept this narrow construction.

In fact, *Danforth* upheld a state requirement of recordkeeping which allowed the state to receive notice of each abortion. *Planned Parenthood* v. *Danforth,* 428 U.S. at 79-81. If the state can require the fact that abortion has been performed on an identified woman to be relayed to an anonymous public official without impermissively burdening the abortional right, there is no doubt that the state possesses the power to require notice to parents of a minor child. Thus, assuming *arguendo* that parents do not even have rights in this context, the Massachusetts Act would be upheld under the *Danforth* analysis since the State, having a right of notice could award such right to the parents.

Mandatory notice of such information to the state may be "unpleasant" in some cases; it may cause some to "avoid or to postpone" the abortion; it may "reflect unfavorably on the character of the patient." *Whalen* v. *Roe,* 429 U.S. 589, 602 (1977). Nevertheless, it "does not automatically amount to an impermissible invasion of privacy." *Id.*

Under this construction of the right first recognized in *Roe,* parental notice, which is necessary in order to effectuate parental rights to guide and influence the child, does not unconstitutionally burden a minor's abortional right. Accordingly the rational relationship test is applicable and the Massachusetts Act, at least so far as it requires notice in every instance, is constitutional. *Maher* v. *Roe,* 432 U.S. 464 (1977).

2. Making and Effectuating the Decision.

With respect to the making and effectuation of the decision itself, if the parents alone are allowed to make the decision the minor will not be able to effectuate her decision in many instances. Assuming such a case the abortional rights of minors would be subsumed by the fundamental rights of parents. This presents the problem resolved in *Danforth.* On the other hand, if the minor would be entitled to decide in all instances, her abortional freedom would subsume parental rights to guide her. *Danforth* suggests that neither right is "more weighty" than the other. Thus, the solution to the problem is to balance the fundamental rights of parents and their minor children according to a reasonable and rational standard, thereby allowing both rights to exist in general and resolving individual cases according to the special circumstances of each case. The standard of the Massachusetts Act permits the court to make the determination on a case by case basis. The standard is "good cause shown." A determination of the standard for the balancing of rights in conflict is a proper legislative function. As this Court has said: "Legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas and Texas Ry. Co.* v. *May,* 194 U.S. 267, 270 (1904) (Holmes, J.). *Maher* v. *Roe,* 432 U.S. at 479-480.

Here because there is an actual limitation on either the parent's right to decide or the minor's right to decide, a burden will be necessarily imposed on one of the rights in conflict. However, rather than promoting its own interest of state at the expense of individual rights as is normally the case in Due Process litigation, the State is merely fulfilling its duty to protect and promote the fundamental rights of all its citizens. Thus a rational relationship test is

indicated. However, even if this Court would apply a more demanding test, your amici point out that the State has a compelling interest, if not duty, to protect the fundamental rights of its citizens and the Massachusetts Act is narrowly drawn to protect that interest. Thus the challenged Act withstands a more demanding test.

B. Broad Construction of the Abortional Right.

1. Notice to the Parents.

The alternative view of the scope of abortional right is that, in addition to the right to decide and effectuate, the woman also has a right to a secret abortion, *i.e.* an abortion without notice to the parents. Assuming *arguendo* that the right includes the right to a secret abortion, the question arises whether a minor's right is as broad. Requiring notice in all instances protects the nucleus of parental rights to guide and counsel and, because parental involvement may enable the minor to make a mature decision, notice protects the basis of the child's right to decide "whether or not" to terminate her pregnancy also.

Furthermore, if the court would allow the child to appear without notice to the parents and allow the abortion, the parents' rights involved in this conflict of rights are terminated without any opportunity to defend them, thereby depriving the parents of Due Process of Law. This Court has held that parents must be notified of an adjudicative hearing before a juvenile court in which the fundamental rights and interests of their minor child are at issue. *In Re Gault,* 387 U.S. 1 (1967). See also *Stanley* v. *Illinois,* 405 U.S. 645 (1972).

The lower court suggests that some parents may abuse their children but one cannot reasonably conclude that because of the remote possibility that some parents may abuse their children that every child is entitled to have an *ex parte* determination by the court without notification to the parents. The Court would, in essence, be determining the parents fitness without an opportunity for the parents to be heard. To take the word of just one party in a dispute and use that as a basis for terminating another's rights is contrary to the entire adversarial method of determining the truth and adjudicating rights in Anglo-American jurisprudence. The practical consequence of allowing this would be to terminate all parents' rights if a child alleges possible "abuse." Yet, as we have indicated in Section I B, parental rights still exist, and with careful balancing, the essence of both fundamental rights can continue in existence. This is done by requiring notice to the parents in all cases, thereby protecting their right to influence, and permitting the child, "for good cause shown," to make and effectuate her decision. Here again the State of Massachusetts is attempting to protect the fundamental rights of its citizens as opposed to promoting its own state interest against the individual. Thus, a rational relationship test is again indicated. Even here, since the State has an important, significant and compelling interest in protecting the fundamental rights of its citizens, the Massachusetts Act survives a more demanding strict scrutiny test.

Thus the only way that both rights may continue in existence is for the parents to be entitled to notice in all instances so they may attempt to persuade and influence their child and, if there is a conflict concerning the ultimate decision, to let the courts resolve it.

2. Making Effectuation of the Abortion Decision.

With respect to the decision aspect of this assumed broad right to an abortion the above analysis in II A 2 of the decision aspect of the narrow right to an abortion, is applicable: the parents have the right to participate in the decision under a standard which balances the fundamental rights involved.

Thus whether this Court takes a narrow view of the broader view of the right created in *Roe* v. *Wade*, with respect to the minor's abortional right, notice to the parents and an opportunity to participate in the decision aspect of the right is not unconstitutional.

CONCLUSION

The Massachusetts Act provides a workable and constitutionally permissible standard to balance the conflicting, fundamental constitutional rights of parents and minor children when a minor seeks an abortion against her parents' wishes.

Respectfully submitted,

VICTOR G. ROSENBLUM
DENNIS J. HORAN
JOHN D. GORBY
THOMAS J. MARZEN
PATRICK A. TRUEMAN
Attorneys for AMERICANS UNITED FOR LIFE, INC. and
EUGENE F. DIAMOND, M.D.
230 North Michigan Ave.
Suite 515
Chicago, Illinois 60601
312/263-5386

APPENDIX

APPENDIX A

Massachusetts General Laws c 112, §12S (1974):

> If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.
>
> Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve U.

APPENDIX B

Illinois Abortion Parental Consent Act of 1977 Illinois Revised Statutes ch. 38 §§ 81-51:

> No abortion shall be performed in this State if the woman is under 18 years of age and has not married except:
>
> (1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment;
>
> (2) After the minor, 48 hours prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion; and
>
> (3) After the consent of her parents is secured and certified in writing.
>
> * * *
>
> If such consent is refused or cannot be obtained, consent may be obtained by order of a judge of the circuit court upon a finding, after such hearing as the judge deems necessary, that the pregnant minor fully understands the consequences of an abortion to her and her unborn child. Such a hearing will not require the appointment of a guardian for the minor. Notice of such hearing shall be sent to the parents of the minor at their last known address by registered or certified mail. The procedure shall be handled expeditiously.